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Wan Ji bin Wan Hussin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-09–383–07 OF 2019
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
25 OCTOBER 2023

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence under s 4(1)(c) of Sedition Act 1948 ('Act 15') — Appellant was convicted by sessions court under s 4(1)(c) of Act 15 and sentenced to nine months imprisonment — igh Court increased sentence to one year imprisonment — Whether Act 15 was constitutional — Whether Act 15 contrary to art 10(2)(a) of Federal Constitution — Whether presumption under s 114A of Evidence Act 1950 applicable — Whether appellant had rebutted presumption under s 114A of Evidence Act 1950 — Whether sentence imposed by sessions court manifestly inadequate or excessive or illegal — Evidence Act 1950 s 114A — Federal Constitution art 10(2)(a) — Sedition Act 1948 ss 3 & 4(1)(c)

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At the sessions court, the appellant was charged under s 4(1)(c) of the Sedition Act 1948 ('Act 15'). The charge against the appellant was in relation to the appellant's action in publishing offensive words and insulting the Sultan of Selangor via the web application of Facebook ('FB'). The prosecution had relied on the evidence of SP1, SP2 and SP7 who had read the said FB postings in support of its case against the appellant. At the end of the prosecution's case, the sessions court found that prima facie case was established when all the elements of the offence as stated in s 3 of Act 15 were fulfilled. The sessions court had also invoked the presumption under s 114A of the Evidence Act 1950 ('the EA') on presumption of fact in publication. In defence, the appellant denied that the FB account with the name of 'Wan Ji At-ta'aduddi (Pak Syaikh Muka Buku)' was his and argued that he only had one FB account with the name of 'Wanji Wanhussin Wanji'. The appellant also denied uploading the FB posts. At the end of the trial, the appellant was convicted and sentenced to nine months imprisonment from the date of conviction. On appeal, the High Court increased the sentence to one-year imprisonment. Aggrieved by the conviction and sentence, the appellant filed the present appeal. The main issues arose in the present appeal were related to: (a) the constitutionality of Act 15 whereby the appellant argued that the said Act was unconstitutional because it restricted the freedom of speech and did not pass the proportionality test to qualify as proper restrictions of art 10(2)(a) of the Federal Constitution ('the Constitution') — with respect to this issue, the appellant relied on the decision in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ

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333 ('Sivarasa Rasiah'); (b) the application of s 114A of the EA — the appellant argued that where there was such evidence available, it would be wrong to invoke a presumption under s 114A of the EA; and (c) the increase sentencing by the learned High Court judge.

Held, dismissing the appeal against conviction, and allowing the appeal against sentence:

(1) It was true that *Sivarasa Rasiah* had alluded to the proportionality test in determining whether a given law was consistent with the Constitution and it had been held that the restriction that may be imposed by the legislature under art 10(2) of the Constitution was not without limit. However, on the issue of constitutionality of Act 15, particularly s 4 of the Act, this matter was tackled and had been ruled by the Federal Court in *Public Prosecutor v Azmi bin Shaarom* [2015] 6 MLJ 7511 whereby the court held that s 4(1) of Act 15 did not run counter to art 10(2)(a) of the Constitution. Therefore, the court found no merit in the appellant's appeal on the first issue of constitutionality (see paras 35–37).

(2) In relation to the application of s 114A of the EA, the court agreed with the prosecution that the said provision would only assist in identifying and in proving the identity of an anonymous person involved in the publication through the internet and the presumption did not determine guilt or liability. Therefore, the court could not agree with the appellant on the disputed application of s 114A of the EA. The court had carefully examined the reasoning by the learned sessions court judge vis-à-vis the evidence as recorded and the court held that the appellant was the 'publisher' of the offensive words and insulting the Sultan of Selangor via the web application of FB in which the presumption in s 114A of the EA was applied. However, the appellant was at liberty to rebut this presumption (see paras 38 & 40).

(3) The court found that the appellant had failed to rebut the presumption and also failed in his defence to cast any reasonable doubt on the prosecution's case. There were plenty of evidence which showed that the appellant was the owner of the said FB's account. The name, picture and phone number were all referred to the appellant himself. In the same vein, the court held that the prosecution succeeded in proving its case against the appellant beyond reasonable doubt. Therefore, the court found no merit in the appellant's appeal on conviction and the conviction was therefore safe (see para 41).

(4) It was trite that the appellate court should be slow in interfering with the sentence imposed by the courts below because a sentence was a matter of discretion unless it was satisfied that the sentence passed by the lower court was manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court

had clearly erred in applying the facts disclosed or that the court had clearly erred in applying the correct principles in the assessment of sentence. The court found that the learned High Court judge had misdirected himself in interfering with the sentence meted out by the learned sessions court judge as there was no error committed in the assessment of sentence. The court found that the sentence imposed by the sessions court could not be said to be manifestly inadequate or excessive or illegal that warranted intervention. The court found the sentence imposed by the sessions court was proper (see paras 42–44).

[Bahasa Malaysia summary

Di mahkamah sesyen, perayu dituduh di bawah s 4(1)(c) Akta Hasutan 1948 ('Akta 15'). Pertuduhan terhadap perayu adalah berhubung dengan tindakan perayu menerbitkan perkataan yang menyinggung perasaan dan menghina Sultan Selangor melalui aplikasi web Facebook ('FB'). Bagi menyokong kes pendakwaan, pihak pendakwaan bergantung kepada keterangan SP1, SP2 dan SP7 yang telah membaca siaran FB tersebut. Di akhir kes pendakwaan, mahkamah sesyen mendapati kes prima facie diwujudkan apabila semua elemen kesalahan seperti yang dinyatakan dalam s 3 Akta 15 dipenuhi. Mahkamah sesyen juga telah menggunakan anggapan di bawah s 114A Akta Keterangan 1950 ('AK') berkenaan dengan anggapan fakta dalam penerbitan. Dalam pembelaan, perayu menafikan bahawa akaun FB dengan nama 'Wan Ji At-ta'aduddi (Pak Syaikh Muka Buku)' adalah miliknya dan berhujah bahawa dia hanya mempunyai satu akaun FB dengan nama 'Wanji Wanhussin Wanji'. Perayu juga menafikan memuat naik siaran FB tersebut. Pada akhir perbicaraan, perayu telah disabitkan bersalah dan dijatuhkan hukuman penjara sembilan bulan dari tarikh sabitan. Atas rayuan, Mahkamah Tinggi menaikkan hukuman kepada penjara selama setahun. Terkilan dengan sabitan dan hukuman, perayu memfailkan rayuan semasa. Isu-isu utama yang timbul dalam rayuan ini adalah berkaitan dengan: (a) keperlembagaan Akta 15 di mana perayu berhujah bahawa Akta tersebut adalah tidak berperlembagaan kerana ia menyekat kebebasan bersuara dan tidak lulus ujian perkadaran untuk layak sebagai sekatan yang sepatutnya ke atas perkara 10(2)(a) Perlembagaan Persekutuan ('Perlembagaan') — berkenaan dengan isu ini, perayu bergantung kepada keputusan dalam kes *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 ('Sivarasa Rasiah'); (b) pemakaian s 114A AK — perayu berhujah bahawa jika terdapat keterangan yang berkaitan, adalah salah untuk menggunakan anggapan di bawah s 114A AK; dan (c) peningkatan hukuman oleh hakim Mahkamah Tinggi yang bijaksana.

Diputuskan, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap hukuman:

(1) Memang benar bahawa *Sivarasa Rasiah* telah merujuk kepada ujian perkadaran dalam menentukan sama ada undang-undang yang berkaitan

adalah konsisten dengan Perlembagaan dan telah diputuskan bahawa sekatan yang mungkin dikenakan oleh badan perundangan di bawah perkara 10(2) Perlembagaan adalah bukan tanpa had. Bagaimanapun, dalam isu keperlembagaan Akta 15, khususnya s 4 Akta tersebut, perkara ini telah ditangani dan telah diputuskan oleh Mahkamah Persekutuan dalam *Public Prosecutor v Azmi bin Shaarom* [2015] 6 MLJ 751 di mana mahkamah memutuskan bahawa s 4(1) Akta 15 tidak bertentangan dengan perkara 10(2)(a) Perlembagaan. Oleh itu, mahkamah mendapati tiada merit dalam rayuan perayu mengenai isu pertama berkaitan keperlembagaan (lihat perenggan 35–37).

(2) Berhubung dengan pemakaian s 114A AK, mahkamah bersetuju dengan pihak pendakwaan bahawa peruntukan tersebut hanya akan membantu dalam mengenal pasti dan dalam membuktikan identiti seseorang yang tidak dikenali yang terlibat dalam penerbitan melalui internet dan anggapan tersebut tidak menentukan kebersalahan atau liabiliti. Oleh itu, mahkamah tidak boleh bersetuju dengan pertikaian perayu mengenai pemakaian s 114A AK. Mahkamah telah meneliti dengan teliti alasan oleh hakim mahkamah sesyen yang bijaksana bersama dengan keterangan seperti yang direkodkan dan mahkamah memutuskan perayu adalah 'penerbit' kata-kata yang menyinggung perasaan dan menghina Sultan Selangor melalui aplikasi web FB tersebut di mana anggapan dalam s 114A AK telah digunapakai. Walau bagaimanapun, perayu bebas untuk menyangkal anggapan ini (lihat perenggan 38 & 40).

(3) Mahkamah mendapati bahawa perayu telah gagal untuk menyangkal anggapan tersebut dan juga gagal dalam pembelaannya untuk menimbulkan apa-apa keraguan munasabah ke atas kes pendakwaan. Terdapat banyak keterangan yang menunjukkan bahawa perayu adalah pemilik akaun FB tersebut. Nama, gambar dan nombor telefon semuanya merujuk kepada perayu sendiri. Dalam nada yang sama, mahkamah memutuskan bahawa pihak pendakwaan berjaya membuktikan kesnya terhadap perayu melampaui keraguan munasabah. Oleh itu, mahkamah mendapati tiada merit dalam rayuan perayu atas sabitan dan sabitan tersebut adalah selamat (lihat perenggan 41).

(4) Sudah menjadi undang-undang yang mantap bahawa mahkamah rayuan haruslah tidak terburu-buru mengganggu hukuman yang dijatuhkan oleh mahkamah-mahkamah rendah kerana sesuatu hukuman adalah mengikut budi bicara melainkan ia berpuas hati bahawa hukuman yang dijatuhkan oleh mahkamah rendah adalah nyata tidak mencukupi atau berlebihan atau menyalahi undang-undang atau sebaliknya bukan hukuman yang sepatutnya dengan mengambil kira semua fakta yang didedahkan atau bahawa mahkamah telah jelas terkhilaf dalam menggunakan fakta yang didedahkan atau bahawa mahkamah jelas terkhilaf dalam menggunakan prinsip yang betul dalam penilaian

hukuman. Mahkamah mendapati hakim Mahkamah Tinggi yang bijaksana telah tersalah arah dalam mengganggu hukuman yang dijatuhkan oleh hakim mahkamah sesyen kerana tiada kekhilafan yang dilakukan dalam penilaian hukuman. Mahkamah mendapati bahawa hukuman yang dijatuhkan oleh mahkamah sesyen tidak boleh dikatakan secara nyata tidak mencukupi atau berlebihan atau menyalahi undang-undang yang memerlukan campur tangan. Mahkamah mendapati hukuman yang dikenakan oleh mahkamah sesyen adalah wajar (lihat perenggan 42–44).]

Cases referred to

Lee May Ling v PP [2019] 8 MLJ 396, HC (refd)
Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor [2021] 2 MLJ 652, FC (folld)
PP v Azmi bin Shaarom [2015] 6 MLJ 751, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (folld)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)

Legislation referred to

Evidence Act 1950 s 114A
Federal Constitution art 8(1), 10(1)(a), (2), (2)(a)
Sedition Act 1948 ss 3, 3(3), 4(1)(c)

Appeal from: Criminal Appeal Nos BA-42S-30–04 of 2018 and BA-42H-61–04 of 2018 (High Court, Shah Alam)

Muhammad Faiz Fadzil (with Mohd Faizal Abdullah) (Faiz Fadzil & Co) for the appellant.
How May Ling (with Aida Khairuleen Azli) (Attorney General's Chambers) for the respondent.

Azman Abdullah JCA:

INTRODUCTION

[1] This is an appeal by an independent speaker, Wan Ji bin Wan Hussin ('the appellant' or 'the accused') against the decision of the High Court which dismissed the appellant's appeal against conviction and sentence made by the sessions court. At the sessions court, the appellant was found guilty of the charge and convicted under s 4(1)(c) of the Sedition Act 1948 (Act 15). the appellant was sentenced to nine-month imprisonment from the date of conviction.

[2] On cross appeal by the public prosecutor to enhance the sentence at the High Court, the sentence then been increased to one-year imprisonment.

[3] After reading the written submissions filed, hearing both parties orally and perusing the records of appeal, we unanimously decided to dismiss the appeal. However, we reinstate the Shah Alam Sessions Court's decision in which the appellant was sentenced to nine-month imprisonment from the date of conviction. We now give our reasons for the same.

THE PROSECUTION CASE

[4] the appellant was charged for publishing offensive words and insulting the Sultan of Selangor via the web application of Facebook which had happened 11 years ago. The charge against him reads as follows:

> Bahawa kamu, pada 5 November 2012, pada jam lebih kurang 10.00 pagi di alamat Pejabat Perumahan Setiausaha Kerajaan Negeri Selangor, Tingkat 5, Bangunan Sultan Salehuddin Abdul Aziz Shah, Seksyen 5, di dalam daerah Petaling, di dalam negeri Selangor Darul Ehsan telah menerbitkan penerbitan yang menghasut dalam laman Facebook https:l/www.facebook.com/wanji.attaaduddi seperti berikut:
>
> 1) Jenis syaitan tak baca hadis nabi kata 'sesungguhnya org yg ada hak, kena bg ruang bersuara'. Bahana bodoh agama tp nak jadi ketua agama ... Sultan Selangor Sultan Shrafuddin Idris Shah bertitah mengingatkan penuntut Universiti Putra Malaysia(UPM) supaya tidak terpengaruh dengan tuntutan kebebasan bersuara yang diperjuangkan segolongan pihak yang hanya mementingkan ideologi politik.
>
> 2) Sultan sel tu tak payah nak ingatkan student UPM ... Dia sendiri tu kena pg ngaji agama lagi ... Kena ajar sultan sel, arak tu haram. Ketua agama tak layak ada hard rock cafe ... Perasan bagus, tp bodoh agama..
>
> 3) Buang je sultan2 ni ... Perabis duit rakyat ...
>
> 4) Sultan sel mengadakan kempen projek pembodohan di Universiti. Masuk Universiti untuk jadi bijak, si syaitan ni buat projek pembodohan ... Bila org bodoh, dia akan berkuasa .... Firaun moden.
>
> 5) Nak kaya dim keadaaan bodoh adalah jadi sultan.
>
> 6) Quran kata, '(firaun) merendah-rendahkan (akal) mereka (rakyat mesir), lalu mereka taat kepadanya' itu di mesir. Kalau di malaysia, yg buat kerja ni adalah UMNO dan Sultan ...'.
>
> dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 4(1)(c) Akta Hasutan 1948 (Akta 15) yang boleh dihukum di bawah Seksyen (4)(1) Akta yang sama.

[5] The background facts leading to the present appeal we respectfully adopt with modification whenever necessary from the grounds of judgment prepared by the learned sessions court judge.

[6] It is on 5 November 2012 when Kamaruzaman bin Ahmad Nor ('SP1') who was at the office located at Selangor State Secretary Housing Office, fifth Floor, Sultan Salahuddin Abdul Aziz Shah Building, Section 5 in Shah Alam has read six posting of which posted by the appellant through his Facebook page via his Facebook account named wanji.attaaduddi ('the FB posts'). SP1 read the FB posts using other's Facebook's user account who was Ahmad Zahiruddin bin Othman ('SP2'). SP2 had aceess to the appellant FB posts since he was in the appellant's friends list. Both SP1 and SP2 read the FB posts using computer and Blackberry phone in which the contents are the same.

[7] The FB posts were making remarks against the Sultan of Selangor were found to be seditious. Therefore, SP1 had screenshot them and saved them from the Blackberry phone. They were then transmitted to the computer which SP1 then made printed copies.

[8] On 12 November 2012 at around 7.33 pm, SP1 lodged a police report as in exh P1 on the reason that he felt that the FB posts were irresponsible writing towards the Sultan of Selangor.

[9] The appellant was arrested on 10 September 2014 at around 1.30am at in front of Restoran Faizul Maju, Jalan Nautika B U20/B, Pusat Komersial TSB Sungai Buloh, Selangor by Insp Mohd Hamizi bin Abu Bakar ('SP9').

[10] The appellant was then charged at the sessions court with committing the offence under s 4(1)(c) of the Sedition Act 1948 which carries a fine not exceeding RM5,000 or a jail term of up to three years or both.

[11] The learned sessions court judge held that the prosecution had made a prima facie case against the appellant and called the appellant for defence. When called for defence, the appellant elected to give sworn testimony. No other witness was called.

[12] In his defence, he denied that he bears the Facebook's account of https://www.facebook.com/wanii.attaaduddi. It is in the appellant's defence that he was aware of the profile of 'Wan Ji At-ta'aduddi (Pak Syaikh Muka Buku)' in the exhs P18A and P18B only after it had been shown by ASP Mohammad Daniel Lee bin Abdullah ('SP11') in 2010 or 2011.

[13] The appellant also denied that he was the one who upload the FB posts. According to the appellant, his pictures are easily available on the internet as he was and the speaker and preacher that many of his photos were taken at the lecture sessions he conducted. the appellant further contended that he only had one Facebook's account since 2009 under the name of 'Wanji Wanhussin Wanji'.

A FINDINGS OF THE LEARNED SESSIONS COURT JUDGE AT THE END OF THE PROSECUTION CASE

[14] At the the close of the prosecution's case, the learned sessions court judge found that the prosecution had successfully made out a prima facie case against the appellant as per the charge. As a result, the appellants were ordered to enter defence.

[15] In arriving at this decision, the learned sessions court judge made his findings as follows:

(a) the prosecution had to prove the elements of the offence in which the elements was stated in s 3 of the Sedition Act 1948 (Act 15);

(b) on the first element as to whether the appellant had published a seditious publication, the learned sessions court judge had relied on the evidence of SP1, SP2 and SP7 that they have read the postings made by the appellant on appellant's Facebook account. In fact, SP2 and SP7 are the appellant's friends on Facebook. Moreover, ASP Mohamad Daniel Lee bin Abdullah (SP11) also had testified that from his investigation, the Facebook's account of https://www.facebook.com/wanilattaaduddi was indeed belongs to the appellant;

(c) on the second element as to whether the appellant's publication had a seditious tendency, the learned sessions court judge again relied on the evidence of SP1, SP2 and SP7 in which he was of the view that even an ordinary public like SP1, SP2 and SP7 found that the words used by the appellant was unjustified and insulting the Sultan of Selangor. In addition to that, there is an evidence of an expert witness, Dr Mohammad Nidzam bin Abduk Kad ('SP6'). According to SP6, the words used by the appellant in such publication was inappropriate and cause harm to society which also may lead to a hateful sentiment. Thus, in this case, the learned sessions court judge opined that the appellant's publication had a seditious tendency;

(d) the learned sessions court judge invoked the presumption under s 114A of the Evidence Act 1950 on presumption of fact in publication. This was taken from the evidence given by SP3 who confirmed that the Facebook account belongs to the appellant and in fact the appellant's personal pictures and phone number were available in the Facebook account. Evidence in exh P5 which were the appellant Twitter account information and registration search with telecommunications company had confirmed that the phone number stated in the Facebook account belongs to the appellant. Those evidence of SP3 were corroborated by the evidence of SP1 , SP2, SP7 and SP10. Furthermore, this fact was not challenged by the appellant himself. the appellant only disputed that he

was no the one who publish the seditious words. Thus, since s 114A of the Evidence Act 1950 was applied, the appellant has to bear the liability of such seditious publication from that Facebook account; and

(e) on the above reasons stated, the appellant was called for defence.

THE DEFENCE CASE

[16] When called for defence, the appellant elected to give sworn testimony. No other witness was called by the defence. He testified that the said Facebook account was not belongs to him. He only had one Facebook account with the name of 'Wanji Wanhussin Wanji' since 2009.

[17] the appellant also denied that he was the one who published the seditious statements. According to the appellant, his pictures are easily available on the internet as he was and the speaker and preacher that many of his photos were taken at the lecture sessions he conducted.

FINDINGS OF THE LEARNED SESSIONS COURT JUDGE AT THE CONCLUSION OF THE TRIAL

[18] According to the learned sessions court judge, it is well known that the profile name can be changed at any time on Facebook. The learned sessions court judge found that both Facebook profile ('Wan Ji At-ta'aduddi (Pak Syaikh Muka Buku)' and 'Wanji Wanhussin Wanji') bare the same Uniform Resource Locator ('urf') which is https://www.facebook.com/wanji.attaaduddi and thus they are the same Facebook account. The appellant also agreed on this.

[19] To add further, the appellant had admitted during cross examination that he is the only one who knows the user ID and password of his Facebook account named 'Wanji Wanhussin Wanji' which has the same url as stated in the charge. Therefore, the learned sessions court judge concluded that the appellant was the only person who has an access to his own Facebook account and no one else.

[20] At the conclusion of the trial, the learned sessions court judge found that the appellant had failed to raise any reasonable doubt to the prosecution's case and that the prosecution had successfully proven the case against the accused beyond a reasonable doubt. Thus, the accused was found guilty and convicted of the charge against him. Consequently, the accused was sentenced to nine months imprisonment.

A FINDING OF THE LEARNED HIGH COURT JUDGE ON THE APPEAL

[21] Aggrieved with the decision of the sessions court, the appellant filed the appeal at the High Court on both conviction and sentence. The public prosecutor also appealed on sentence. In the petition of appeal at the High Court, the appellant had raised 16 grounds of appeal while the public prosecutor raised five grounds of appeal.

[22] The learned High Court judge held that the appellant's appeal be dismissed. On the other hand, the learned High Court judge allowed the public prosecutor's appeal in which the sentence was increased from nine months to one year of imprisonment. The sentence was increased after considering the interest of the public in which to prevent others from committing the same offence in the future.

[23] The particular reasons for the dismissal of the appellant's appeal was that there is no error or misdirection on the part of the learned sessions court Judge towards his finding of guilt against the appellant. No miscarriage of justice was done throughout the trial. All the elements of the offence were analysed in detail. Thus, there is no reason for the High Court to disturb the findings of the sessions court judge.

[24] The learned High Court judge also found that the issues raised by the appellant were unable to tarnish the prosecution's case. the appellant's testimony that he is not the one who has published such seditious publication was held by the learned High Court judge as a bare denial without being supported by any other evidence or witness.

[25] The learned High Court judge went further by saying that whatever freedom is given, it is limited in the scope of the laws and the norms of life. He cited the decision of DYMM Raja Azlan Shah J in the case of *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 which stated that 'In my view, the right to free speech ceases at the point where it come within the mischief of s 3 of the Sedition Act'.

THIS APPEAL

[26] Dissatisfied with the decision of the High Court, the appellant are now appealed to this Court of Appeal. The petition of appeal meant to exculpate the appellant based on 19 grounds as follows.

[27] To make it condense, among the contention of the appellant is that where there is such evidence available, it would be wrong to invoke a

presumption under s 114A of the Evidence Act 1950. The counsel for the appellant relied on the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705. The reason being, according to the appellant, where the court relies on a statutory provision relating to a presumption of law, it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it. This results in a legal burden being imposed on an accused person and it would be different if the court acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus, for the fairness to the accused, it was submitted that the presumption provisions are used only when there is no evidence of the facts to be presumed.

[28] The appellant's counsel further submitted that when the presumption provisions are invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances, it violates art 8(1) of the Federal Constitution which guarantees equal protection of the law.

[29] Another point raised by the appellant is that the prosecution has failed to prove that it was the appellant who published the seditious words in which only Facebook is able to confirm this. The prosecution recognised that this as an essential element which need to be proved and that is why SP3 applied to Facebook in the USA for such confirmation but did not receive any reply. This, according to the appellant, had resulted in a serious gap to the prosecution case.

[30] The appellant also raised an issue of the constitutionality of the Sedition Act 1948 in which it was submitted that the said act is unconstitutional as it restricts the freedom of speech and do not pass the proportionality test to qualify as proper restrictions of art 10(2)(a) of the Federal Constitution. On the other word, the law promulgated under art 10(2) must pass the proportionality test in order to be valid. The appellant relied on the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. The appellant further stated that the Federal Court decision in the case of *Public Prosecutor v Azmi bin Shaarom* [2015] 6 MLJ 751 which had ruled that the said Act is constitutional does not bind this court.

[31] On the sentence imposed by the High Court, it was submitted that the learned High Court judge misdirected himself in interfering with the sentence meted out by the learned sessions court judge as there was no error committed in the assessment of sentence. It was also submitted that the sentence meted out by the learned sessions court judge was clearly excessive having regard to the mitigating factors put forth by the appellant, ie this being his first offence and there being no evidence that he would repeat the same. The appellant cited the case of *Lee May Ling v Public Prosecutor* [2019] 8 MLJ 396 (TAB 15) in which in this case, the original sentence of five months imprisonment by the sessions

court was set aside and replaced with a maximum fine of RM5,000.

[32] On the contrary, the prosecution submitted that there is no appealable error in the judgment of the learned sessions court judge and affirmed by the learned High Court judge which warrant this court interference based on the following account:

(a) the presumption of fact in publication prescribed under s 114A of the Evidence Act was to be applied in a narrow sense and did not determine guilt or liability. This presumption will assist in identifying and in proving the identity of an anonymous person involved in the publication through the internet;

(b) the law will presume the intention of the accused in a trial for sedition. *Ratanlal & Dhirajlal's Law of Crimes* at pp 418 and 419 explains that the intention of the accused tried for sedition can be inferred from the language and words used in the article that he published. Hence there is absolutely no need for the prosecution to prove his intention and it is submitted that when a person writes or publishes an article which carries the natural and probable effect of being seditious, common sense dictates that he is presumed to intend the natural and ordinary consequences of his action;

(c) the prosecution is relieved from the burden of proving the intention of the maker of the seditious statement by virtue of s 3(3), but still has the obligation to prove the other mental elements corresponding with the other elements of the offence; and

(d) as for the appeal on sentence, the prosecution submitted that the sentence is not only within the ambit of the punishable section, but it is also assessed and passed in accordance with established judicial principles. The sentence is not grossly excessive or illegal.

OUR DECISION

[33] From the grounds of appeal raised in this appeal, we sum up that the main issue of this appeal is first on the constitutionality of Sedition Act, second on the application of s 114A of the Evidence Act and third on the increase sentencing by the learned High Court Judge.

[34] Counsel for the appellant raising the point that Sedition Act amounts to an 'unreasonable restriction' to the respondent's right of freedom of speech and expression under art 10(1)(a) of the Federal Constitution which rendered unconstitutional. The appellant relied on the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333.

[35] This constitutionality argument of Sedition Act was already discussed by the Federal Court in the case of *Public Prosecutor v Azmi bin Shaarom* [2015] 6 MLJ 751 in which the Federal Court had ruled that the said Act is constitutional.

[36] It is true that *Sivarasa Rasiah* had alluded to the proportionality test in determining whether a given law is consistent with the Constitution and it had been held that the restriction that may be imposed by the Legislature under art 10(2) of the Federal Constitution is not without limit. However, on the issue of constitutionality of Sedition Act particularly s 4 of the Act, this matter was tackled and had been ruled by the Federal Court in *Azmi bin Shaarom* to which it was held as follows:

> In the result, we hold that s 4(1) of the Act does not run counter to art 10(2)(a) of the Constitution. Accordingly, our answer to the first question is in the negative.

[37] Therefore, we find no merit in the appellant's appeal on the first issue of constitutionality.

[38] Next, the issue of the application of s 114A of the Evidence Act. We agree with the submission of the prosecution that the provision only assist in identifying and in proving the identity of an anonymous person involved in the publication through the internet and the presumption did not determine guilt or liability.

[39] We are guided by the decision of the Federal Court in *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] 2 MLJ 652 which held as follows:

> [196] It is equally important to state that s 114A in no manner imputes guilt or liability on the part of the 'publisher'. It merely alters the normal course of proof such that it becomes incumbent upon the presumed publisher to explain why he is not responsible for the content on the internet portal or site. In this context as stated by Abdul Rahman Sebli J (now FCJ) in *Tong Seak Kan v Loke Ah Kin* [2014] 6 CLJ 904 warrants reassertion:
>
> > [22] Clearly the legislative scheme of s 114A(2) is merely to presume or presuppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary. *It is by no means an irrebuttable presumption and neither does it finally determine the publisher's liability or guilt. No one can be found liable in a civil claim nor guilty in a criminal prosecution on account of* s 114A(2) standing alone unless of course there is total failure of rebuttal.
>
> [197] As further pointed out by counsel f or the respondents, s 114A was intended to address the mischief posed by internet anonymity. This is borne out by the Hansard where the then Minister moving the bill explained that the rapid developments in the use of the internet and information technology at the time had

given rise to cybercrime and other criminal offences through that medium. In line with this, the amendment introducing s 114A, was necessary to control or deal with the issue of internet anonymity.

[198] As such, with the application of the section, the only conclusion that can be drawn is that prima facie, the first respondent is the 'publisher' of the impugned comments but is at liberty to rebut this presumption.

[40] Therefore, in this appeal before us, we are unable to agree with the submission of the learned counsel for the appellant on the disputed application of s 114A of the Evidence Act. We have carefully examined the reasoning by the learned sessions court judge vis a vis the evidence as recorded and we hold that the appellant is the 'publisher' of the offensive words and insulting the Sultan of Selangor via the web application of Facebook in which the presumption in s 114A of the Evidence Act is applied. However, the appellant is at liberty to rebut this presumption.

[41] Nevertheless, we find that the appellant had failed to rebut the presumption and also failed in his defence to cast any reasonable doubt on the prosecution's case. There are plenty of evidences which show that the appellant is the owner of the said Facebook's account. The name, picture and phone number are all refer to the appellant himself. In the same vein we held that the prosecution has succeeded in proving its case against the accused beyond reasonable doubt. Therefore, we find no merit in the appellant's appeal on conviction, the conviction is safe. As such the appeal on conviction is dismissed.

[42] We now turn to the appellant's appeal on sentence. After considering the facts and the laws pertaining to sentencing, we agree with the submission of the appellant that the learned High Court judge had misdirected himself in interfering with the sentence meted out by the learned sessions court judge as there was no error committed in the assessment of sentence.

[43] It is trite that the appellate court should be slow in interfering with the sentence imposed by the courts below because a sentence is a matter of discretion unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256). In this regard, we are also guided by the decision of Federal Court in the case of which held as follows:

[236] As sentence is a matter of discretion, the appellate court should be slow in interfering with the sentence imposed by the courts below. Raja Azlan Shah Ag LP (as His Royal Highness then was) in *Bhandulananda Jayatilake v Public*

Prosecutor [1982] 1 MLJ 83, at p 84 opined:

> ... that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[44] We are of the considered view that the sentence imposed by the sessions court could not be said to be manifestly inadequate or excessive or illegal that warrants intervention. We find it to be proper. We therefore allow the appeal on sentence.

CONCLUSION

[45] In the upshot, having perused the appeal records, the grounds of judgement and the written submissions by parties and for the reasons mentioned above, it is our unanimous decision that the conviction against the accused is safe and needs no intervention by this court. Therefore, the appeal on conviction is dismissed. However, since we allow the appeal on sentence, we therefore set aside the High Court decision on sentence. We sentence the appellant with nine-month imprisonment to take effect from the date of the order (25 September 2023). Warrant of committal to be issued and bail to be returned.

Appeal against conviction dismissed; appeal against sentence allowed.

Reported by Dzulqarnain Ab Fatar